

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Western Wireless Corporation)	
Petition For Waiver of)	
Section 54.314(d) of the Commission's Rules)	
)	

To: Wireline Competition Bureau

**WESTERN WIRELESS PETITION FOR WAIVER OF
SECTION 54.314(D) OF THE COMMISSION'S RULES**

Western Wireless Corporation ("Western Wireless"), by counsel and pursuant to Section 1.3 of the Commission's rules, hereby petitions for a waiver of the deadline set forth in Section 54.314(d)(1) of the rules for the filing of an annual certification regarding the proper usage of high-cost universal service support, to enable it to receive support beginning in the first quarter of 2003 for portions of South Dakota outside the Pine Ridge Reservation. 1/

Western Wireless was designated as an Eligible Telecommunications Carrier ("ETC") by the South Dakota Public Utilities Commission ("SD PUC") in

1/ The FCC designated Western Wireless as an ETC with respect to service to native Americans on the Pine Ridge Reservation in South Dakota on October 5, 2001. *Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota*, 16 FCC Rcd 18145 (2001) (finding jurisdiction); 16 FCC Rcd 18133 (2001) (designating Western Wireless as an ETC). Western Wireless' provision of universal service to the Pine Ridge Reservation, and its receipt of high-cost support for providing that service, are not at issue in this petition.

October 2001, and has commenced providing universal service in rural, high-cost areas that are eligible for universal service support. The requested waiver is appropriate due to the extraordinary delays in processing Western Wireless' compliance filing and certification of Western Wireless' proper use of high-cost support. Moreover, grant of the requested waiver will advance the public interest and will benefit consumers in rural areas of South Dakota by promoting the provision of universal service and adhering to the principle of competitive neutrality. Accordingly, the Commission should follow its well-established precedent and issue a waiver of the certification deadline in the rules to enable Western Wireless to receive high-cost support effective the beginning of the first quarter of 2003.

Background

Western Wireless is a Commercial Mobile Radio Service ("CMRS") carrier that has been designated as an ETC in 14 states, including South Dakota, and is eligible to receive high-cost universal service support pursuant to Section 54.307 of the Commission's rules. The arduous saga of Western Wireless' pursuit of ETC status in South Dakota is legendary. The instant petition is the final step in this process, which has taken almost five years to date.

On August 25, 1998, Western Wireless filed an application for designation as an ETC in both rural and non-rural study areas in South Dakota. After a full-blown evidentiary hearing, the SD PUC denied Western Wireless' ETC application on May 19, 1999. The SD PUC's denial was reversed by the state appellate court, and that court's judgment was affirmed by the state supreme court,

which remanded the case to the SD PUC with instructions to designate Western Wireless as an ETC in non-rural areas and for findings on whether designating Western Wireless in rural telephone company areas would be in the public interest. 2/ Concurrently, the FCC issued a declaratory ruling holding that the SD PUC's denial of ETC designation to Western Wireless violated Sections 253 and 254 of the Act and would have been subject to preemption had it not been reversed by the court. 3/

On remand, the SD PUC on October 18, 2001 issued two orders: one designating Western Wireless as an ETC in non-rural telephone company areas, and one concluding that designating Western Wireless as an ETC in rural telephone company areas was in the public interest. 4/ With respect to rural areas, the SD PUC concluded, "the Commission finds that it is in the public interest to designate GCC as an ETC for the study areas of the rural telephone companies

2/ *Filing by GCC License Corp. for Designation as an Eligible Telecommunications Carrier*, TC98-146, Findings of Fact and Conclusions of Law; Notice of Entry of Order (SD PUC May 19, 1999) (available at <http://www.state.sd.us/puc/Tc99orders/Tc98-146.htm>); *rev'd*, Civ. 99-235 (SD 6th Jud. Cir. Mar. 22, 2000), *aff'd*, 623 N.W.2d 474 (S.D. Supreme Ct. 2001).

3/ *Federal-State Joint Board on Universal Service; Western Wireless Corp. Petition for Preemption of an Order of the South Dakota Public Utilities Commission*, Declaratory Ruling, 15 FCC Rcd 15168 (2000), *recon. and pet. for review pending*.

4/ *Filing by GCC License Corp. for Designation as an Eligible Telecommunications Carrier*, TC98-146, Order Designating GCC License Corp. as an Eligible Telecommunications Carrier in Non-Rural Telephone Company Exchanges (SD PUC Oct. 18, 2001) (available at <http://www.state.sd.us/puc/2001/Telecom01/TC98-146des.pdf>) ("Non-Rural ETC Order"); *Filing by GCC License Corp. for Designation as an Eligible Telecommunications Carrier*, TC98-146, Findings of Fact and Conclusions of Law; Notice of Entry of Order (SD PUC Oct. 18, 2001) (available at <http://www.state.sd.us/puc/2001/Telecom01/TC98-146fof.pdf>) ("Rural ETC Order").

listed in Attachment A, upon GCC's compliance with the conditions listed in findings of fact 20-24." 5/ Those conditions related to Western Wireless' specific plans for advertising of its universal service offering, expanded local calling areas, Lifeline/Link-Up plans for low-income consumers, and dispute resolution provisions in Western Wireless' service agreement for universal service customers. Western Wireless filed its compliance plan on August 28, 2002, thus satisfying the SD PUC's conditions for designation as an ETC in rural telephone company areas.

Thereafter, on September 27, 2002, Western Wireless filed with the FCC and with the Universal Service Administrative Co. ("USAC") its self-certification, pursuant to Sections 54.314(b) and (d)(1) of the rules, that it will use high-cost support in accordance with the statutory requirements. 6/ Even though, as a CMRS carrier not subject to state rate or entry regulation, Western Wireless believed that its federally-filed certification was sufficient, it nonetheless also filed with the SD PUC on September 11, 2002 a certification pursuant to Section 54.314(a) of the rules. 7/ To Western Wireless' surprise, the SD PUC denied

5/ *Rural ETC Order* at 6-7 (Conclusions of Law, ¶ 6).

6/ On September 27, 2002, pursuant to Sections 54.307(b) and (c)(2) of the rules, Western Wireless also filed the required customer count information with USAC throughout its designated service area in South Dakota, including those on and off the Pine Ridge Reservation.

7/ In Western Wireless' experience, some states take the position that they lack authority to certify that CMRS carriers, which are not subject to state commission rate or entry regulation (*see* 47 U.S.C. § 332(c)(3)), will use federal high-cost universal service funding only for the provision, maintenance, and upgrading of facilities for which the support is intended, pursuant to Section 54.314(a) of the Commission' rules. Consequently, Western Wireless files its certifications directly with the FCC and USAC. Additionally, to ensure that the states are fully informed of its use of federal high-cost funds for the

Western Wireless' certification in an order issued September 27, 2002, taking the position that it had not yet completed its review and approval of Western Wireless' compliance filing and that it needed additional financial information from Western Wireless to approve the certification. 8/

Although Western Wireless believed based upon the *Rural ETC Order* and standard state commission practice 9/ that its compliance filing was effective upon filing, the SD PUC continued to debate the issue and, on January 6, 2003, it issued an order concluding that Western Wireless' compliance filing satisfied the conditions specified in the *Rural ETC Order* and confirmed that Western Wireless is designated as an ETC for specified rural telephone company study areas in South Dakota. 10/ And then, on February 20, 2003, the SD PUC approved Western

provision of universal service, Western Wireless also files certifications with state commissions. Western Wireless has taken the same approach with respect to South Dakota. *See infra* note 17.

8/ *Request of WWC License LLC for Certification Regarding Its Use of Federal Universal Service Support*, TC02-156, Order Denying Certification (SD PUC Sept. 27, 2002) (available at <http://www.state.sd.us/puc/2002/Telecom02/TC02-156den.pdf>).

9/ Western Wireless has found that, in most cases where a state commission has approved an ETC designation request contingent upon a compliance plan, the filing of the compliance plan fulfills the state commission's order and no further procedures or formal approval by the state commission is necessary. For example, this was the case in Iowa, New Mexico, and North Dakota. By contrast, other state commissions, such as Nebraska, specifically ordered that the compliance filing is subject to approval by the commission. The SD PUC did not do so.

10/ *Filing by GCC License Corp. for Designation as an Eligible Telecommunications Carrier*, TC98-146, Order Designating Western Wireless as an ETC for Areas Served by Certain Rural Telephone Companies (SD PUC Jan. 6, 2003) (available at <http://www.state.sd.us/puc/2003/Telecom03/TC98-146etc.pdf>).

Wireless' certification that it will use federal high-cost support in a manner consistent with the Act. 11/

Request for Waiver

Under Section 1.3 of the Commission's rules, the Commission grants waivers of its rules when an applicant demonstrates that "special circumstances warrant a deviation from the general rule and such a deviation would serve the public interest." 12/ In general, the rules presume that a carrier has already been designated as an ETC, and require advance notice to enable USAC to calculate support for a quarter with sufficient advance notice. The rules are not designed for the case of a carrier first receiving ETC designation, and certainly do not contemplate the delays that were imposed by the extraordinary proceedings that Western Wireless underwent before the SD PUC.

The Commission has recognized on numerous occasions involving both competitive ETCs and ILECs that that, under circumstances where a carrier initially receives ETC designation, delaying the disbursement of universal service support funds would be inequitable and would frustrate the underlying purposes of

11/ *Request of Western Wireless Corp. for Certification Regarding Its Use of Universal Service Support*, TC03-045, approved, Minutes of the South Dakota Public Utilities Commission Meeting, Thurs., Feb. 20, 2003, 2:00 pm, Pierre, S.D. (agenda item #17) (available at <http://www.state.sd.us/puc/2003/Minutes03/Feb20mn.HTM>).

12/ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3. The Commission's rules provide, "The Wireline Competition Bureau . . . will, among other things . . . [a]ct on requests for interpretation or waiver of rules." 47 C.F.R. § 0.91(b); *see also* 47 C.F.R. § 0.291.

the Commission's universal service rules. ^{13/} For example, in a recent case presenting circumstances virtually identical to this one, the Bureau held:

The certification filing schedule set out in the Commission's rules was adopted to ensure that USAC has sufficient time to process the certifications prior to its submission of estimated support requirements to the Commission. It would be onerous, however, to deny an ETC receipt of universal service support for an entire quarter, as a result of a particular ETC designation having occurred after the certification filing deadline. We therefore find that RFB Cellular has demonstrated special circumstances that justify a waiver of section 54.314. In this instance, these special circumstances outweigh any processing difficulties that USAC may face as a result of the late-filed certification. ^{14/}

Moreover, grant of the requested waiver would advance the public interest. The Commission has recognized on a number of occasions that a carrier – and the consumers it serves – should not be deprived of universal service support

^{13/} *RFB Cellular, Inc. Petition for Waiver of Sections 54.314(d) and 54.307(c) of the Commission's Rules and Regulations*, 17 FCC Rcd 24387 (Wireline Comp. Bur. 2002) (“*RFB Cellular*”); *Connecticut Department of Public Utility Control Request for Waiver of State Certification Requirements for High-Cost Universal Service Support for Rural Carriers*, 17 FCC Rcd 24804 (Wireline Comp. Bur. 2002); *Smith Bagley, Inc. Petition for Waiver of Section 54.809(c) of the Commission's Rules and Regulations*, 16 FCC Rcd 15275 (Com. Car. Bur. 2001); *West Virginia Public Service Commission Request for Waiver of State Certification Requirements for High-Cost Universal Service Support For Non-Rural Carriers*, 16 FCC Rcd 5784 (2001); *Petition of the Public Service Commission of the District of Columbia for Waiver*; *Petition for Waiver Filed By the New Jersey Board of Public Utilities*, 15 FCC Rcd 21996 (Com. Car. Bur. 2000); *American Samoa Government and the American Samoa Telecommunications Authority Petition for Waivers and Declaratory Rulings*, 14 FCC Rcd 9974 (Acctg. Policy Div., Com. Car. Bur., 1999); *Centennial Cellular Corp. Request for Waiver of Section 54.307(b) of the Commission's Rules*, DA 99-453, CC Docket No. 96-45, 1999 WL 111461 (Acctg. Policy Div., Com. Car. Bur., 1999); *Sandwich Isles Communications, Inc. Petition for Waiver of Section 36.611 of the Commission's Rules*, 13 FCC Rcd 2407 (Acct'g and Audits Div., Com. Car. Bur., 1998); *South Park Tel. Co., Petition for Waiver of Sections 36.611 and 36.612 of the Commission's Rules*, 13 FCC Rcd 198 (Acct'g and Audits Div., Com. Car. Bur., 1997). Notably, all but one of these orders were adopted by the Bureau acting on delegated authority.

^{14/} *RFB Cellular*, 17 FCC Rcd at ¶ 8.

due to inordinate delays in the submission of required filings by state commissions (and even, on occasion, by carriers themselves). 15/ Denying Western Wireless support for the first and second quarters of 2003 under these circumstances would frustrate the statutory goal of promoting the availability of universal service at affordable rates to consumers in high-cost, rural, and insular areas, and would undermine the Commission's established principle of competitive neutrality. 16/ Western Wireless and the consumers of South Dakota should not be penalized further due to the timing of the SD PUC's procedures in response to Western Wireless' ETC compliance filing and certification. 17/

For the reasons stated above, Western Wireless respectfully submits that the requested waiver should be granted expeditiously.

15/ See *supra* note 12.

16/ *RFB Cellular*, ¶ 9.

17/ Western Wireless' circumstances here are identical to those faced by RFB Cellular and Smith Bagley, Inc., both of which filed their own certifications with the FCC pursuant to Section 54.314(b) of the rules, and later received certification from the state commissions pursuant to Section 54.314(a) of the rules. Both companies sought and received waivers of the deadlines relating to those certifications. Compare *RFB Cellular*, ¶ 4 n.13 with Michigan Public Service Commission, "State Certification for the Use of Federal Universal Service Funds" (CC Docket No. 96-45, filed Sept. 18, 2002), at 2 (approving certification of RFB Cellular); compare *Smith Bagley, Inc. Petition for Waiver of Section 54.809(c) of the Commission's Rules and Regulations*, 16 FCC Rcd 15275 (Com. Car. Bur. 2001) with Arizona Corporation Commission, "Certification for Federal Universal Service Fund Recipients" (CC Docket No. 96-45, filed Sept. 25, 2001), at 1 (approving certification of Smith Bagley, Inc.).

Respectfully submitted,

WESTERN WIRELESS CORPORATION

Gene A. DeJordy,
Vice President of Regulatory Affairs
WESTERN WIRELESS CORP.
3650 131st Ave., S.E., Ste. 400
Bellevue, WA 98006
(425) 586-8700

Mark Rubin
Director of Federal Government
Affairs
WESTERN WIRELESS CORP.
401 Ninth St., N.W., Ste. 550
Washington, D.C. 20004
(202) 654-5903

By: /s/ David L. Sieradzki

Michele C. Farquhar
David L. Sieradzki
HOGAN & HARTSON LLP
555 Thirteenth St., N.W.
Washington, D.C. 20554
(202) 637-5600

Its Counsel

March 13, 2003